No. 15032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an individual Trading and Doing Business as GLANDULAR PRODUCTS COMPANY, and ALLEN H. PARKINSON, an Individual Trading and Doing Business as TIDE MAILING SERVICE, and MARGARET M. WILLIS,

Appellees.

APPELLEES' BRIEF.

DANIELS, ELSON & MATHEWS,
541 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEES' BRIEF.

I.
PRELIMINARY STATEMENT.

The single issue to be determined is stated in paragraph 2(a) of the Stipulation and Order approved by the District Court on November 5, 1954 [R. 71]:

> "Does the District Court in this case have discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U. S. C. 332(a), to compel a defendant who has sold drugs in violation of the Federal Food, Drug and Cosmetic Act, to tender a refund of the purchase money to customers who have bought those drugs?"

The single statutory provision involved is Section 302(a) of the Federal Food, Drug and Cosmetic Act (21 U. S. C. 332(a)):

> "The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title except paragraphs (e), (f) and (h)-(j).

The statutory reference hereinafter made to the Federal Food, Drug and Cosmetic Act will be to the sections of that Act, rather than to the sections of the U. S. Code.

If the Court does not have the power under the terms of this statutory provision to compel the tender of a refund of the purchase money to customers who have bought articles sold in violation of the Federal Food, Drugs and Cosmetics Act, the power does not exist.

Although the issue before this Court is stated in the Stipulation and Order referred to, nevertheless, it is essential that it be defined even more precisely so that it may be placed and considered in its proper perspective.

Although the issue here is phrased in terms of "discretionary" power to compel refunds, there is nothing discretionary about the power itself. If this legal power or authority exists, it exists without regard to the discretion of any Court. *Only its exercise may properly be termed discretionary.* And this, under the terms of para-

graph 2(b) of the Stipulation and Order [R. 71] was specifically reserved to the District Court for subsequent consideration in this case if—and only if—the power itself was first found to exist. The District Court found that the power did not exist. In its opinion that Court said, in part:

> "Restitution, apart from its equitable considerations may also be considered punitive. It is a further method of punishing a defendant in that it requires him to pay over monies in his possession to others. There is a line of authorities that 'an injunction is primarily a preventive remedy; it looks to the future rather than to the past. It is not for the purpose of punishing for wrongful acts already committed.' *Hygrade Food Products Corp. v. United States* (8 Cir. 1947) 160 F. 2d 816, and cases cited at page 819; *Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co.* (8 Cir. 1950) 181 F. 2d 812 at 814; *American Chicle Co. v. Topps Chewing Gum* (2 Cir. 1954) 210 F. 2d 680 at 683. We conclude that the remedy of restitution is not within the powers of the district court under the statute. The Food, Drug and Cosmetic Act has provided the sanctions of (1) criminal prosecution and punishment of violators (21 U. S. C. A., Sec. 333), (2) seizure of goods shipped in violation of the Act (21 U. S. C., Sec. 334(a)), and (3) injunctions against further violations (21 U. S. C. A., Sec. 332(a)). There is no indication in Congressional history that supports any other sanction or specifically the power to order restitution under the Food, Drug and Cosmetic Act. The contrary was true in the Congressional history of the Emergency Price Control Act.

> "The government's arguments that such power in a district court are necessary to effect the essential objectives of the Act and to protect the public's pocketbook should be addressed to Congress, not to a district court. The jurisdiction and power of this court stem not from things necessary or desirable, but from Congressional action." [R. 82-83.]

Put another way, if the Court has this power, it has it in all cases where violations may be restrained and not only in certain cases, nor only "in this case," although the issue, as stated, naturally refers to the case at bar. This must be recognized if the full scope and impact of the issue before this Court is to be clearly understood. Thus, for example, although we are here dealing with drugs, all foods, devices and cosmetics having interstate relations are equally affected, for the Court has the same jurisdiction "to restrain violations" affecting these as it has with respect to drugs.

Moreover, although here the specific violation alleged relates to misbranding, if the power exists to command refunds, it must also exist with respect to every other violation of Section 301 which could be restrained under Section 302(a).

By Section 301(a), (b) and (c) the adulteration of any food, drug, device or cosmetic is prohibited, and hence the introduction of any such article into interstate commerce or delivery for receipt in interstate commerce may be restrained and under the Government's theory, refunds ordered.

Under Section 404, the Secretary of Health, Education and Welfare is given certain emergency permit authority over foods; Section 505 establishes a procedure controlling the shipment of new drugs in interstate commerce. Since Section 301(d) prohibits the violation of these sections such violations may also be restrained, and would also fall within the scope of the Government's theory authorizing the court to compel refunds to purchasers.

Section 301(g) prohibits the *manufacture* within any Territory of any food, drug, device or cosmetic that is adulterated or misbranded. Since such manufacture may be restrained, refunds here could also be ordered if the Government's position were correct. Violation of Section 301(k), (l), (m) and (n) may also be restrained under Section 302(a). It is worth noting what some of these prohibitive acts are, for they make plain the broad sweep and ambit of the proposition which the Government seeks here to establish.

For example, Section 301(l) prohibits the use in any advertisement or labeling relating to any drug, any representation or suggestion that a new drug application is effective, or that a drug complies with the provisions of the new drug section. This is prohibited even if true. Refunds could be ordered to all purchasers of such drugs under the Government's view. An even more startling result could arise under Section 301(m), once the power to compel refunds is found to exist. That section prohibits the sale or offering for sale of colored margarine

or the possession or serving of colored margarine, unless the margarine is packaged in retail packages of one pound or less, the lettering of the word "margarine" on the package is of the appropriate size and all the ingredients are stated on the package. (21 U. S. C. 347(b).) So far as sales in public eating places are concerned, a violation occurs if margarine in a form ready for serving is found at such establishment unless an appropriate sign appears on the premises where it may be readily seen, or on the menu, and unless each separate serving bears or is accompanied by labeling identifying it as margarine and is triangular in shaps. (Sec. 407(b) and (c).)

These provisions—and not all of them have been detailed here—serve to emphasize what the Government is seeking in the instant litigation. For once the principle is established that the power "to restrain violations" includes the power to compel refunds, then the power would exist not only in cases such as the one at bar, but for example, in cases where margarine is sold in a square rather than in a triangular shape, or where some reference is made in the advertising of a new drug that an application therefor is effective, or where the alleged violation is technical, unintentional and inadvertent.[1]

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[1]See, *e.g., United States v. Cowley Pharmaceuticals, Inc.,* No. 7369 (D. Mass., 1948), Kleinfeld and Dunn, *Federal Food, Drugs, and Cosmetic Act,* 1938-1949, p. 473 at 474: ". . . the Act is sufficiently broad to allow the issuance of an injunction even though no wilfulness or knowledge on the part of the respondent or its agents is shown."

II.
SUMMARY OF ARGUMENT.

A. The Issue Before This Court Is Strictly a Question of Jurisdiction.

The issue before this court being one of jurisdiction, is strictly a legal issue and does not depend in any degree upon the underlying facts, "factual background" or the merits of this proceeding. Hence the "factual background" of the Government's prayer for restitution (App. Br. pp. 4-12) is wholly irrelevant to a consideration of the question, and the issue before this court.

B. The Equitable Power to Order Restitution in an Appropriate Case Has No Application in Injunction Proceedings, Under the Federal Food, Drug and Cosmetic Act.

The equitable powers of the District Court, in exercising the power conferred by Congress under Section 302 of the Federal Food, Drug and Cosmetic Act, are limited by the grant of jurisdiction. Traditional equitable powers may be employed by Federal Courts only where it appears that Congress intended them to have such powers. No such intention can be derived either from the long legislative history of the Federal Food, Drug and Cosmetic Act, or under any reasonable construction of its language.

C. The Rent and Price Control Cases.

The rent and price control analogy is in fact no analogy at all. The statutes involved in the rent and price control cases were far more expansive in their grant of jurisdiction than in the grant conferred by Section 302 of the Food, Drug and Cosmetic Act. Those statutes conferred upon the administrator the right to apply to the appropriate court "* * * for an order enjoining such acts

or practices, or for an order enforcing compliance with such provisions, and upon a showing by the administrator that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, *or other order,* shall be granted without bond." (Italics added.) Under Section 302a of the Food, Drug and Cosmetic Act, the power conferred upon the court is limited solely "to restrain violations."

D. The Fair Labor Standards Cases.

The Fair Labor Standards Act cases likewise present no analogy helpful in the present case. Although some Appellate Court cases held that under that Act restitution of back pay could properly be ordered as an adjunct to an injunction, under Section 17 of that Act, the Supreme Court never ruled upon the question, but left it open. Congress, concerned with the Appellate Court's interpretation of Section 17, amended it to provide in express terms that restitution was *not* authorized under it, thus bluntly repudiating the *asserted* powers of a District Court to order restitution under the Fair Labor Standards Act, with its almost identical provisions to that of Section 302a of the Food, Drug and Cosmetic Act.

E. The Antitrust Cases.

The antitrust divestiture analogy employed by the Government is likewise of no assistance. Divestiture is not restitution, as the Government uses that term here. Divestiture requires the defendant to sell his offending interest or stock or properties or to divest himself of his holdings. He is deprived of the offending property *at a price.* He is not required to restore anything either to his competitor or to any member of the business who may have been injured by his monopolistic practices.

III.
ARGUMENT.

A. The Issue Before This Court Is Strictly a Question of Jurisdiction.

The single issue now before this Court is a strictly legal one. It does not depend in any degree upon the underlying facts or merits of the instant proceeding. That there is presented here solely a question of law, of statutory authority and jurisdiction, is made clear by the Stipulation and Order approved by this court on November 5, 1954 [R. 71]. Not only is this accomplished by the statement of the issue itself in paragraph 2(a), but it is underlined by paragraph 2(b) and particularly by paragraph 5 of that Stipulation and Order which declares that *only* if that issue is first resolved in favor of the Government would the next issue then arise, namely, whether an order compelling refunds ought to issue in the instant case. To that end paragraph 5 provides that the parties would *then* bring "all facts pertinent to that issue before the Court as expeditiously as possible."

Yet the Government, in its Brief (App. Br. pp. 4-12), has in a lengthy tirade against these defendants, sought to inject factual matters, in an apparent effort to inflame and prejudice the Court against these particular defendants, and thus obtain a favorable decision on the issue of law under consideration. Thus, even in the "Summary of Proceedings," the drugs here involved are twice referred as "nostrums." (App. Br. p. 2.) They are also referred to as "worthless sex rejuvenator drugs. (App. Br. p. 2.)

In the so-called "Factual Background"—although the Government would have to concede that the particular

facts of the alleged violation can have no bearing upon the jurisdictional issue involved—the persons purchasing the drugs are referred to as "hapless" (App. Br. p. 4) and "defrauded" (App. Br. p. 12), and previous legal difficulties of the defendants are described in what is apparently intended to be lurid detail. Not only are these previous legal difficulties detailed by the Government in its brief, although they have no pertinence whatever to the existence or non-existence of the power to compel refunds, but the defendants are throughout referred to in the most derogatory terms. While thus presumably giving the "factual background"[2] of the instant proceeding, the Government has gone far afield in the use of adjectives and expressions openly aimed at incensing the Court against these defendants to such a degree that the Court would determine the legal issue involved—which would affect thousands of later defendants in entirely different circumstances—in favor of the Government. It has no other relevance and can have no other purpose.

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[2]The "factual background" as presented by the Government does not do so fairly. It neglects to inform the court that Judge Metzger who heard the 1949 case against Allen H. Parkinson, without a jury, only fined him $100 per count thus reflecting his feeling that this defendant's violation was relatively minor in character and not remotely as serious or dangerous to health as the Government would have this Court believe. The Government also glosses over the fact that this Court (Judge Westover), after trial, refused to grant the injunction sought in September, 1949, finding that with the revised labelling there was no violation of the Food, Drug, and Cosmetic Act in the marketing of these drugs. While this decision was later reversed by the Court of Appeals, the fact that this Court found and held as it did certainly demonstrates that the conduct of Allen H. Parkinson in that situation as well was not as black as the Government now seeks to paint it. (*United States v. El-O-Pathic Pharmacy, et al.,* No. 10-266-HW (S. D. Calif., May 22, 1950).

The stipulation and order *re* restitution reserved to the defendants "the right to object to the consideration by the court of any facts alleged in the complaint appearing in any other documents or exhibits, on the ground that they are irrelevant, or should not be considered by the court in deciding the issues stated in par. 2(a) [R. 72].

Such "facts" can only be relevant if jurisdiction exists in the court to order restitution. Such "facts" are dependent entirely upon the existence of jurisdiction, and then come into play (if jurisdiction existed) for the purpose of enabling the court, in its discretion, to determine whether restitution, under those facts, should be considered. Therefore, the question of jurisdiction is solely a question of law, not dependent upon any extraneous circumstances.

As stated by Mr. Justice Story, in the early case of *Ex parte Watkins,* 7 Peters 568, 32 U. S. 568, 572 (1833):

> "But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it, but upon its right to hear and decide it at all."

In *Dewey v. United States,* 178 U. S. 510, 521 (1899) Mr. Justice Harlan said:

> "Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction, as in effect to adjudge that to be law which Congress has not enacted as such."

Therefore, the so-called "facts" alleged in the Government's brief are completely irrelevant on the subject of

whether this court has jurisdiction to do that which the Government seeks—order restitution.

The vital inquiry, however, is why the Government felt it necessary to make this deliberate attempt to sway the Court emotionally on a question of law, a question which depends entirely upon statutory interpretation rather than upon the alleged conduct or misconduct of any particular defendants. We submit that the reason that the Government felt compelled to take this approach is that the Government's position and argument on the present issue is comparable to a huge inverted pyramid with its entire structure and content teetering precariously on the simple statutory language "to restrain violations," attempted to be supported and bolstered by "analogies" drawn from unrelated cases, in unrelated fields, based on unrelated statutes.

There is no decision under the Federal Food, Drug, and Cosmetic Act which sanctions the remedy sought here by the Government, nor even hints that it exists. There is nothing—not a single syllable—in the entire legislative history of this statute which was under consideration and scrutiny for 5 years, that suggests that the power to compel refunds was included in the authority "to restrain violations." There is no shred of evidence that Congress intended to grant such authority or jurisdiction, or even dreamed that such power existed under the statutory language used. Nor is there any evidence that for at least 13 years under the present Act, the Government itself ever thought, believed or claimed that such authority existed. Yet in this proceeding, the Government seeks to have this Court now discover that in addition to the arsenal of remedies so carefully and thought-

fully spelled out by Congress during years of legislative hearings and after 30 years of experience under the previous food and drug statute of 1906, there exists—and has always existed—the drastic authority to compel refunds in every situation where violations of the Act could be restrained. This, we respectfully submit, would be judicial legislation with a vengeance.

The Government's argument that there exists—and has always existed, though heretofore unsuspected—the judicial power to compel refunds in all situations in which a court could "restrain violations" under the Federal Food, Drug and Cosmetic Act, rests entirely upon certain Rent and Price Control cases, some Fair Labor Standard Act decision, divestiture in Sherman Act antitrust litigation, the so-called "inherent power" of a court of equity to grant "restitution," and the alleged need for this drastic remedy to "facilitate enforcement" of the Act.[8]

Many situations where the proposed remedy would be impossible, impractical or inequitable have been pointed

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[3]These analogies and arguments have been analyzed and discussed pro and con in the food and drug literature during the past 3 years since restitution first appeared upon the food and drug horizon:

Rhyne, *Penalty Through Publicity: FDA's Restitution Gambit,* 7 Food, Drug, Cosmetic L. J. 666-680 (1952);

Noland, *Section 302(a) of the Federal Food, Drug, and Cosmetic Act: Restitution Re-examined,* 7 Food, Drug, Cosmetic L. J. 373-400 (1952);

Lev, *The Nutrilite Consent Decree,* 7 Food, Drug, Cosmetic L. J. 56, 65-67 (1952);

Developments in the Law—The Federal Food Drug, and Cosmetic Act, 67 Harv. L. Rev. 632, 718-720 (1954);

Levine, *Restitution—A New Enforcement Sanction,* 6 Food Drug, Cosmetic L. J. 503-514 (1951);

Goodrich, *Modern Application of an Ancient Remedy,* 9 Food, Drug, Cosmetic L. J. 565-572 (1954);

out.[4] Thus, for example, how would purchasers be found or located where a food, drug, device or cosmetic has been sold nationally during the past 10 years through retail outlets and distributors rather than through mailing lists? Who would have the responsibility and who would bear the heavy cost of determining the purchasers entitled to refund? Would this impossible burden be imposed upon the manufacturer or distributor? And what proof would be necessary for an alleged purchaser to establish that he had, in fact, been a purchaser of the article? Although the impracticability and uneven or inequitable operation of a remedy—particularly an equitable one—is perhaps persuasive evidence of its nonexistence and evidence that Congress did not intend it to exist, we recognize that it is not determinative of that legal issue. Hence we shall here attempt to confine ourselves to the single proposition that Section 302(a) of the Federal Food, Drug and Cosmetic Act of 1938 confers no jurisdiction to compel refunds.

Williams, *If This Be Equity,* 10 Food, Drug and Cosmetic P. J. 92 (Feb., 1955);

Note, 4 Stan. L. Rev. 519-536 (1952).

The propriety of the use of the term "restitution" in the context in which the Government here uses it has been seriously—and we believe properly—questioned. Certain fundamental elements of the equitable remedy of restitution are totally lacking as that concept is sought to be applied in the compulsory refund to all purchasers of the total purchase price regardless of value received, regardless of reliance upon any alleged misbranding, and regardless even of any fraud or deception. (Rhyne, *supra,* at pp. 674-676.)

[4]See, for example, Rhyne, *supra,* at 676; 67 Harv. L. Rev., *supra,* at 720.

B. The Equitable Power to Order Restitution in an Appropriate Case Has No Application in Injunction Proceedings Under the Federal Food, Drug and Cosmetic Act.

The Government's brief says (App. Br. p. 18) that "the fundamental premise in the trial court's decision appears to be that this proceeding is not in equity," referring to the statement in the court's opinion, which reads as follows:

> "We start with the axiomatic premise that the district court is one of limited jurisdiction, and has only the power and the jurisdiction spelled out in the statutory enactments of Congress. We exclude from consideration the general equity power of the court called into play in a diversity suit, and also exclude those situations in which, by statute, the Congress has expressly provided that the court may exercise all the powers of a court of equity. We also exclude from consideration the power of a district court to compel compliance with its orders when violated or threatened to be violated (McComb v. Jacksonville Paper Co., (1949), 336 U. S. 187, 193.) Sec. 332(b) 21 U. S. C. A., expressly makes reference to a violation of the injunction, and proceedings thereon." [R. 76.]

The court there simply said that the grant of jurisdiction under Section 302(a), "to restrain violations" did not likewise confer jurisdiction to "exercise *all* powers of a court of equity." (Italics supplied.)

Then, in support of that conclusion, the court went on to discuss the so-called analogy relied upon by the Gov-

ernment—the rent control cases, etc.; that Section 302(a) called into play all of the inherent powers of a court of equity. In conclusion the court held that these were not valid analogies. In the final analysis the basic question here is simply: Did the grant of jurisdiction conferred by Section 302(a), "to restrain violations," also confer jurisdiction to order restitution.

The Government prefaces its entire discussion of its various statutory analogies by a dissertation on the principles governing the equitable remedy of restitution to prevent unjust enrichment. (App. Br. pp. 18-26.) We have no quarrel with what is said there regarding restitution, its potency as a remedy, or its ancient origin. It is simply without application here under the plain language of the controlling statute.

Significant, too, however, for it relates to what we have adverted to earlier, is the Government's statement that there is nothing unusual "under these ancient principles of justice" for "a person deprived of money through a sale of merchandise induced by *fraudulent misrepresentation*" to ask that his money be restored to him. (App. Br. p. 25.) *Even if this be conceded, the power which the Government seeks this Court to find in the Food and Drug Act goes far beyond this statement.*

Not only is the power not to be found to have the *Government* do this on behalf of individuals, however few or many, claiming to be thus aggrieved, but if the power exists at all in the phrase "to restrain violations" it is not limited and cannot be limited to situations of alleged fraudulent misrepresentation. It would apply, as we have said, with equal force to *every* violation which can now be restrained whether it be misbranding or

adulteration, whether the violation be intentional or due to mistake, inadvertence, neglect or even natural chemical changes in the product.[5] To limit the existence of the power in the Food and Drug Act to cases of *fraudulent misrepresentation* can only be accomplished by Congress.

Injunctions are generally classified as affirmative or negative. Section 302(a) of the Federal Food and Drug Act confers jurisdiction "to restrain violations" of nine of the fourteen subsections of Section 301 and is thus explicitly negative in character. This negative character of the injunctive power under the statute here involved was well stated in *Hygrade Food Products Corporation v. United States,* 160 F. 2d 816, 819 (C. A. 8, 1947), in language having particular pertinence here:

> "The jurisdiction of the court, however, is limited to restraining violation of Section 331, and that is the introduction or delivery for introduction into interstate commerce of products that are adulterated or misbranded. An injunction is primarily a preventive remedy; it looks to the future rather than to the past. It is not for the purpose of punishing for wrongful acts already committed."

To argue, as the Government does, that a court acting under Section 302 acts as a court of equity *with the power* to utilize any or all of the traditional equitable powers including restitution, overlooks the source of federal equity jurisdiction and the sharply limiting language of Section 302 itself. The equity jurisdiction of federal courts is derived only from the Constitution (Art. III, Sec. 2, Cl. 1) and laws of the United States. Federal

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[5]See, Rhyne, *supra,* at pp. 674-675.

courts may thus employ traditional equitable powers only where it appears that Congress intended them to have such powers. Such does not appear either in the long legislative history of the Food and Drug Act, or, we submit, under any reasonable construction of its language.

Where Congress had wished to confer full equitable jurisdiction it has been able to do so in unequivocal language, as in the Trade-Mark Act of 1905, as amended (15 U. S. C., Sec. 1116):

> "The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, *according to the principles of equity,* and upon such terms as the court may deem reasonable to prevent the violation of any right of the registrant of a mark. . . ." (Emphasis supplied.)

Or in the statute authorizing producers of agricultural products to form associations where under certain conditions the District Court is given jurisdiction "to enter a decree affirming, modifying, or setting aside said order, *or enter such other decree as the court may deem equitable.* . . ." (Emphasis supplied.) (7 U. S. C., Sec. 292.)

It is a familiar legal principle that statutory remedies are exclusive; that where a statute creates a right or liability and provides its own remedy, that remedy is exclusive. Thus, for example, in *Pollard v. Bailey,* 87 U. S. 520, 527 (1874) the Supreme Court declared:

> "The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. *But where the pro-*

vision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." (Emphasis supplied.)

Of many cases to the same effect, see:

Farmers' and Mechanics' National Bank v. Dearing, 91 U. S. 29, 35 (1875);

Fourth National Bank v. Francklyn, 120 U. S. 747, 756 (1887);

Globe Newspaper Co. v. Walker, 210 U. S. 356, 364-367 (1908).

Are the statutory remedies inadequate? Would it be desirable to add additional enforcement weapons to the existing statutory arsenal? Just as the Government does here, these questions have been put to courts many times in the past. The answer uniformly made, as it should be made here, is the only one which a court under our system can give:

> "Inadequate it may be to fully protect . . . yet such as Congress has seen fit to give, and which it, not the courts, have power to enlarge by amendment of the statutes." (*Globe Newspaper Co. v. Walker, supra,* at page 364.)

And:

> "For any inconveniences that may result . . . it is for Congress alone to apply the needful remedy." (*Arnson v. Murphy,* 109 U. S. 238, 243 (1883).)

Noteworthy, too, is the failure by the Government for a period of 13 years under the Food and Drug Act of 1938 to claim anywhere or in any forum the right to apply for a compulsory refund order or to assert the power of a court to grant it. It is true that non-exercise

of authority or power actually conferred by Congress does not destroy the jurisdiction given. But coupled with the absence of any express grant, and the total absence of any supporting legislative history, the complete silence of so active and so alert an agency as the Food and Drug Administration for 13 years is extremely powerful evidence of the non-existence of the claimed authority.

The Supreme Court has given weight and consideration to *negative* administrative conduct in passing upon jurisdictional questions. When the Federal Trade Commission instituted a Section 5 proceeding against an intrastate merchant on the theory that his alleged unfair methods handicapped interstate competitors, the Supreme Court in *Trade Comm'n v. Bunte Bros.,* 312 U. S. 349, 351-352 (1941), stated in language fully applicable here:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

And as Justice Frankfurter said in *62 Cases of Jam v. United States,* 340 U. S. 593 (1951), a leading case under the Federal Food, Drug and Cosmetic Act:

> "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the

> point where Congress indicated it would be stopped. . . . Indeed, the Administrator's contemporaneous construction concededly is contrary to what he now contends."

We repeat—there are no Federal Courts of Equity except to the extent of jurisdiction conferred by Congress. Such courts have no equity jurisdiction *per se,* but only the capacity to employ equitable principles, when as a prerequisite Congress has placed certain causes within the court's cognizance.

In *Briggs v. U. S. Machinery Company,* 239 U. S. 48, 50 (1915), the court said, in a memorandum opinion by Mr. Justice Van Devanter,

> "* * * counsel for the plaintiff * * * endeavors to maintain the jurisdiction of the District Court by a reference to the general powers of Federal Courts, when setting as courts of equity; evidently forgetting that such powers can be exerted only in cases otherwise within the jurisdiction of those courts, as defined by Congress."

In *Porter v. Warner Holding Co.,* 328 U. S. 395 (1946), so strongly relied upon by the Government in its discussion of the so-called analogy to the rent and price control cases, and which will be more fully discussed under that heading in this brief, the court held that the order for restitution was a "proper other order" and that the inherent equitable jurisdiction "thus called into play" (p. 400) by the "other order" provision authorized restitution. Inherent equity jurisdiction is not the root of the power to order restitution. In the *Warner* case it was said, as to the power conferred by Section 205(a) of the Emergency Price Control Act, that "it is an occasion where *Congress has authorized,* save in one aspect, the broad equity jurisdiction that inheres in courts * * *"

(p. 403). This is judicial observance of a Congressional right to call into play as much or as little of equitable principles as it desires. Section 302(a) of the Food, Drug and Cosmetic Act calls into play only so much of the total potentialities of equity as a concept, as is necessary to restrain violations. It is submitted that the cases containing broad statements concerning the extent of the inherent powers of a court of equity involve statutes where the full equity powers of a court were conferred by Congress.

If the Government's argument is valid, then in each case in which the power to restrain violations is given, restitution could be ordered. For example, cases arising under the Federal Trade Commision Act—and countless others. In the racial discrimination cases, there was involved the right previously given by Congress to enjoin the enforcement of State statutes, violative of the Federal Constitution, thus opening the door to mandatory injunctions, and the full equity powers to effectuate decrees. In such cases, obviously, restraining the enforcement of an invalid State law would have no effect, unless the full equity powers of the court were available to effectuate the decree.

It appears to us that "the forgotten man" in this case is Congress, and what Congress intended. The basic question is whether Congress intended, by its grant of the power "to restrain violations" of the Food, Drug and Cosmetic Act, to also confer the ancillary power to order restitution. A very informative article on the legislative history of Section 302(a) is exhaustively treated in an article by John B. Buckley, Jr., a full-time instructor of law at New York University Law Center. His article is entitled *"Injunction Proceedings"* and will be found in the Federal Food, Drug and Cosmetic Law Journal, issue

of July, 1951, Volume 6, at page 515. It will be seen, from a study of this article, that never once during the five-year course of the Food, Drug and Cosmetic Act through Congress, was it contended or even mentioned that the power conferred by Section 302(a) conferred also the ancillary power to order restitution.

The Federal Food, Drug and Cosmetic Act was prepared and strenuously supported throughout its five-year journey by representatives of the Food and Drug Administration, to remedy difficulties existing in the 1906 Act. The legislative history shows that the principal argument concerning the power to restrain given by Section 302(a), had to do with the power of equity to restrain criminal acts.

It has heretofore been argued, and undoubtedly will be, that the principal object of restitution is the protection of the pocket-book of the consumer. If this is a proper objective, it could be used in every case arising under the Act, for that purpose, but the question inevitably is whether Congress at any time intended that to be the case. The legislative history of the Act, as we have said, is completely silent on the subject.

If the Government's present argument is true, there would never be a need for an "other order" provision such as we find in the rent and price control cases, but it is manifest that when Congress intended to confer upon the Court a power greater than that "to restrain" violations, they would so provide, and when they did not intend it, it was omitted. Also, if the Government's present argument is valid, the restitution could be awarded for every dollar's worth of sale of an offending product, since 1906, if a product had been known that long.

Nothing in the legislative history closely approximates any support of such a conception.

C. The Rent and Price Control Cases.

The Government's principal reliance appears to be based upon *Porter v. Warner Holding Co.,* 328 U. S. 395 (1946), a Supreme Court decision construing the jurisdictional grant of Section 205(a) of the Emergency Price Control Act of 1942. (56 Stat. 23, 33, 50 U. S. C. App., Sec. 925(a).) That section provides that the Administrator, if he believes violations have occurred or are threatened, may apply to the appropriate court:

> ". . . for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, *or other order* shall be granted without bond." (Emphasis supplied.)

A mere reading of this broad statutory grant of authority readily discloses decisive differences between this language and the limited grant of authority given under Section 302(a) "to restrain violations."

But Section 205(a) of the Emergency Price Control Act of 1942 (and its equivalent, Sec. 206(b) of the Housing and Rent Act of 1947)[6] first reached the Supreme Court in *Hecht Co. v. Bowles,* 321 U. S. 321 (1944). The Administrator, finding a department store had exceeded maximum prices and failed to keep records as required by certain regulations, sought an injunction relating to these particular violations. The Supreme Court found that the court could under the statutory language involved, fashion an appropriate decree to obtain compliance (p. 328):

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[6]61 Stat. 199 (1947); 50 U. S. C. App., Sec. 1896(b).

"It seems apparent on the face of section 205(a) that there is some room for the exercise of discretion on the part of the court. For the requirement is that a 'permanent or temporary injunction, restraining order, or other order' be granted. Though the Administrator asks for an injunction, some 'other order' might be more appropriate, or at least so appear to the court . . . Such an order, moreover, would seem to be a type of 'other order' which a faithful reading of section 205(a) would permit a court to issue in a compliance proceeding. However that may be it would seem clear that the court might deem some 'other order' more appropriate for the evil at hand than the one which was sought."

The important thing to be noted in the *Hecht* case for our purposes, is that the Supreme Court based its decision that the court could issue an appropriate decree upon a "faithful reading" of the "other order" language in Section 205(a). Moreover, the Supreme Court pointed to a passage in the Act's legislative history showing a Congressional desire to grant the courts essentially full equity powers under that statute:

"Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." (S. Rep. No. 931, 77th Cong., 2d Sess., p. 10.)

Thus the later language in the opinion describing the wide powers of a court of equity are bound to the "other order" language of the statute and its legislative history which lends support to the court's view—both of which elements are significantly lacking in the Food and Drug Act.

In the *Warner Holding Company* case, the Administrator sought to restrain rent overcharging and to require restitution of excessive rents collected in the past. Both

lower courts found they lacked jurisdiction to award restitution. The Supreme Court reversed, resting jurisdiction to issue a mandatory restitution order on precisely the same basis as in the *Hecht* case, namely, the "other order" language in the controlling statute (p. 399):

> "As recognized in Hecht Co. v. Bowles, . . . the term 'other order' contemplates a remedy other than that of an *injunction or restraining order,* a remedy entered in the exercise of the District Court's equitable discretion." (Emphasis supplied.)

The identical legislative history relied upon in the *Hecht* case is again referred to by the Supreme Court in the *Warner Holding Co.* case to reinforce its opinion (pp. 400-401). Both in the District Court (*Bowles v. Warner Holding Co.,* 60 Fed. Supp. 513, 519-520 (D. Minn., 1944)) and in his brief before the Supreme Court the Administrator's position was that restitution was authorized as an "other order" and not as an inherent equity power of the court.

The Government, in its brief in this case (pp. 26-29), understandably emphasizes and quotes extensively language from the opinion of Justice Murphy which deals generally with the broad and all-encompassing powers of a court of equity, but the decision itself rests squarely upon the "other order" language of the statute. All other discussion regarding equitable powers follows and is dependent upon the statutory grant of such powers to the court under the "other order" language of the Price Control Act. This language, and thus such broad grant of authority, is absent in the Food and Drug Act.

If further evidence were necessary as to the basis of the *Warner Holding Co.* decision, and that it rests upon the vital "other order" language of that statute, it may

be found in the later Supreme Court decision of *United States v. Moore,* 340 U. S. 616 (1951).[7] There, in referring to its decision in the *Warner Holding Co.* case, the Court declared (pp. 619-620):

> *"This Court reversed, concluding that an order of restitution was a proper 'other order.'* This interpretation was required to give effect to the congressional purpose to authorize whatever order within the inherent equitable power of the District Court may be considered appropriate and necessary to enforce compliance with the Act. . . .
>
> *Adhering to the broad ground of interpretation of the 'other orders' provision adopted in the Warner case, we think the order for restitution entered by the District Court in this action was permissible under Section 206(b)."* (Emphasis supplied.)

Certainly, when the decisions are examined, the Government can find little, if any, support for its position in the Rent and Price Control cases.[8]

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[7]Under Section 206(b) of the Housing and Rent Act of 1947, as amended, which contains the same "other order" language found in Section 205(a) of the Emergency Price Control Act of 1942, which was the section involved in the *Warner Holding Co.* case.

[8]The fundamental differences in purpose between Rent and Price Control legislation and the Fair Labor and Standards Act on the one hand and the Federal Food, Drug, and Cosmetic Act on the other, and the effect of such differences upon the issue of restitution has been well-stated:

> "The payment of prescribed sums of money is the essence and purpose of the Fair Labor Standards Act, and also of rent and price control laws. Effectuation of the policies of these laws requires the payment of proper sums. But the Federal Food, Drug, and Cosmetic Act is not concerned with payment of money. Its purpose, or as much of it as is relevant here, is to prevent misbranding; that purpose can be accomplished by a restraining order. In the Federal Food, Drug, and Cosmetic Act, therefore, the power to restrain implies no more than it expresses and there is no authority in any court to decree restitution as an incident of a decree of injunction against misbranding. There is only authority to restrain the misbranding." (Rhyne, *supra,* at p. 678.)

D. The Fair Labor Standards Cases.

The Government also relies upon some cases arising under the Fair Labor Standards Act. Prior to its amendment in 1949, Section 17 of that statute was very similar in phrasing to Section 302(a) of the Federal Food, Drug and Cosmetic Act; it gave the District Courts jurisdiction "to restrain violations" of the minimum wage and maximum hour provisions of the Act. (29 U. S. C., Sec. 217.) Various lower courts held that there was jurisdiction under Section 17 to order restitution of illegally withheld wages. The Supreme Court, however, never ruled on the question, expressly leaving the question open in *McComb v. Jacksonville Paper Co.,* 336 U. S. 187, 193 (1949).

But Congress, alarmed by the interpetation given Section 17 by such cases as *O'Grady*[9] and *Scerbo*[10] upon which the Government's argument in this field principally depends, did not leave the question open. In unmistakable terms it repudiated the cases favoring restitution and amended Section 17 to provide in express terms that restitution was not authorized under it:

> "Section 17 . . . *Provided,* That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

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[9]*Walling v. O'Grady,* 146 F. 2d 422 (C. A. 2, 1949).

[10]*McComb v. Frank Scerbo & Sons,* 177 F. 2d 137 (C. A. 2, 1949).

The House Managers' Statement of the amendments (H. R. Rep. No. 1453, 81st Cong., 1st Sess.) said of the amendments:

> "This provision has been inserted in section 17 of the act in view of the provisions of the conference agreement contained in Section 16(c) authorizing the Administrator in certain cases to bring suits for damages for unpaid minimum wages . . . The provisions, however, will have the effect of reversing such decisions as *McComb v. Scerbo* . . ."

Senator Pepper's statement for the majority of Senate conferees declared:

> "It is intended to deprive the courts of jurisdiction to exercise their equitable powers to order back wages in purely injunctive actions, as was done in *McComb v. Scerbo* . . ."

Rep. Lucas made a most revealing statement in the course of House debating. (Cong. Record (Aug. 8, 1949), p. 11217.) Addressing himself to a proviso to section 16(c) in another bill, to the effect that "nothing in this subsection shall affect or limit in any way the full equity jurisdiction of courts under section 17 of this Act," he asserted:

> "I wondered why they put that in there, and I found out that there were a couple of decisions recently where a federal court exercised the purported equitable power to order the restitution of back wages, in an injunction suit. The Secretary of Labor wants that power set out in the law and confirmed, so he is setting out that the equity jurisdiction of the court is not to be meddled with. So you can see that they are not only taking the power to bring suit back to 1938, but they are taking the

> power to bring restitution suits in the form of injunctions, *something that the Congress never intended when it originally passed this act . . .*" (Emphasis supplied.)

The Government attempts to soften this blunt repudiation by Congress of the asserted power of restitution under the Fair Labor Standards Act by an argument which appears to be that this was done, not because of any absence of power under the prior statutory language, but because it was replaced with a section giving aggrieved employees a special statutory remedy in Section 16(c) (App. Br. p. 36).

How this tenuous line of reasoning can be squared with the blunt and unequivocal language quoted above is difficult to perceive. But an even more pertinent inquiry presents itself. In view of this history—both judicial and legislative—of so similar a provision, should the present issue not be presented to Congress rather than to this Court for determination? If the history of the Fair Labor Standards Act is any guide—and the Government apparently believes it is—the Congress would certainly be the appropriate forum for a consideration and resolution of the multitude of problems and conflicts inhering in this remedy when sought to be applied in food and drug cases.

In referring to the amendment of the Fair Labor Standards Act, the Government declares that in lieu of restitution ancillary to an injunction under Section 17 prior to amendment "a special statutory remedy" was "meticulously worked out" by Congress for the benefit of aggrieved employees (App. Br. p. 36). This cannot be accomplished by any court; it must and can only find that the remedy does or does not exist. Yet the Governmen

has made no approach to Congress to obtain express restitution jurisdiction for the courts nor to obtain any other special statutory remedy for purchasers of foods, drugs, devices and cosmetics marketed in violation of the Federal Food, Drug and Cosmetic Act. Despite the experience with the Fair Labor Standards Act which is delineated in detail in its brief, it seemingly prefers to attempt to repeat that experience involving long, costly, and indecisive litigation.

It is worth noting, in passing, that the authority given the Administrator under Section 16(c) to sue for back wages on behalf of employees was only conferred under carefully guarded conditions—conditions and limitations which would not exist under the Food and Drug Act, were the court to rule in accordance with the Government's contention here. One especially important qualification in the authority given the Administrator under Section 16(c) is that such back pay actions were to be governed by the 2-year statute of limitations in the 1947 Portal-to-Portal Act. (29 U. S. C., Sec. 216(c).) Obviously, no such fixed limitation could be imposed were the Government's view adopted that the power to compel refunds is ancillary to its authority "to restrain violations" under the Federal Food, Drug, and Cosmetic Act. In fact, it is possible, were the Government to prevail, that it could seek restitution for every dolar's worth of sales since 1938, where an allegedly misbranded or adulterated product has been marketed for that period of time. This, too, serves to underscore and bring into perspective the scope and sweep of the power which the Government asserts exists, and exists without benefit of further Congressional action or consideration.

E. The Antitrust Cases.

The Government next refers to divestiture under the Sherman Act as analogous to the form of restitution sought here, and argues that since it is a useful, equitable remedy there, the power to compel refunds is, or should be, equally available here. This ignores the wide differences between divestiture and a compulsory refund of all consideration received, and the basic distinctions between the statutes involved, their diverse functions, histories and purposes.

Divestiture is not restitution as the Government uses that term here. Divestiture requires the defendant to *sell* his offending interest or stock or properties; it is not taken from him. He is ultimately deprived of the offending property—at a price— but divestiture does not restore anything either to his competitor or to any member of the public who may have been injured by the defendant's monopolistic practices or activities in restraint of trade.

Stated another way, in antitrust law the equivalent of "restitution" as urged under the Food and Drug Act would be, not divestiture, but either (1) collection by the United States on behalf of the public of the amounts paid by reason of defendant's statutory violations, or, (2) the compulsory refund of such amounts, at the behest of the United States, to all of the defendant's customers. Neither of these, to our knowledge, has yet been done under the Sherman Act.

The authority to divest under the Sherman Act derives from the nature and purpose of that statute. Its aim is not only to bar the formation of conspiracies in restraint of trade and attempts to monopolize, not only to prevent the continuance of an illegal conspiracy or monopoly, but also to destroy even just the existence of the power and intent to monopolize. Thus, for example, as the Supreme Court said in the *Paramount Pictures* case:

> ". . . monopoly power, whether lawfully or unlawfully acquired, may violate section 2 of the Sherman Act though it remains unexercised . . . for as we stated in *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 811, the existence of power 'to exclude competition when it is desired to do so' is itself a violation of section 2, provided it is coupled with the purpose or intent to exercise that power." (*United States v. Paramount Pictures,* 334 U. S. 131, 173 (1948).)

It was early recognized by the Supreme Court that the onsolidation of great corporations may result in a monoply "against which public regulations will be but a feeble rotection." (*Pearsall v. Great Northern Railway,* 161 J. S. 646, 677 (1896).) The combination must, therepre, be broken up to effectuate the purposes of the Sherian Act. Divesture (without restitution) is, therefore, necessary step in the enforcement of the Sherman Act s construed by the courts. (See, for example, *Northern ecurities Co. v. United States,* 193 U. S. 197 (1904).) he combination there had already been effected when the overnment sued. Had it been allowed to pursue its urse, as planned, the purpose of the antitrust law would tently have been nullified.

It is not so with the Food, Drug, and Cosmetic Act. The shipment or doing of some other act with respect to a food, drug, device, or cosmetic is effectively stopped by an injunction against such shipment or other act. The Act is not violated by the *possession* of articles, except margarine, which would be adulterated or misbranded and subject to being proceeded against, if shipped in interstate commerce. Unlike the Sherman Act, neither divestiture nor restitution is thus necesary to achieve the purpose of prohibiting shipment or other acts at which the Food and Drug Act is aimed.

IV.
CONCLUSION.

It is, of course, true that the Federal Food, Drug and Cosmetic Act is a remedial statute designed as Justice Frankfurter declared, to protect the public. But presumably, every act of Congress is aimed to protect or advance the public interest. Some statutes have wider scope and broader application than others, but fundamentally their purpose and design are and must be the same. Because the Food and Drug Act is also of this character, as the Government so strongly emphasizes (App. Br. pp. 45-52), is not ground for extending "the scope of the statute beyond the point where Congress indicated it would stop . . ." (*62 Cases of Jam v. United State, supra*). Jurisdiction of a Federal court does not depend upon public policy, need or desirability. It depends solely and only upon the grant of Congress. The alleged need or desirability of restitution to "facilitate en-

dorsement" cannot supply what is lacking in statutory power.[11] By every test—the language employed, its 5-year legislative history, its 13-year administrative construction—the power and jurisdiction to order compulsory refunds as the Government urges does not exist under the Food and Drug Act as now written.

If there were doubt as to whether or not such jurisdiction existed, it should, under the circumstances, be resolved against its existence. The far-reaching consequences of the judicial discovery of so drastic a remedy having application in every case where a violation could be restrained are such that the task of defining the remedy, its scope and application, and under what conditions or limitations it may be sought is one which can properly only be accomplished by Congress.

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[11]"We have been told that the question is 'whether the Government may vindicate private rights in its injunction suit'; that if it may not 'we must accept as part of our interstate distributional system the predatory entrepreneur who executes a get-rich-quick scheme of relieving thousands of our citizens of relatively small individual sums of money through fraudulent promises as to the great curative or restorative powers of his own particular nostrum' and so on. (*Goodrich, supra,* at pp. 566, 567.)

"I am not disposed to concede that we are put to this choice.

"If the existing statutory remedies are inadequate to prevent mulcting of the public in the manner described, it seems clear that the proper course is to ask Congress for legislation to meet the problem. I suggest, therefore, that the choice is *not* either to do nothing or to insist that the courts grant restitution under existing law. It is rather, it seems to me, to do nothing or to go to Congress. The Food and Drug Administration has a splendid record of obtaining effective statutory sanctions from Congress when the public interest has warranted such sanctions. There is no reason to believe that appropriate legislation could not be obtained in this instance if Congress is shown convincing evidence that a serious defect exists in present statutory enforcement machinery." (Williams, If This Be Equity, *supra,* p. 103.)

For all of the foregoing reasons, therefore, the question which this court is called upon to decide is that question stated in paragraph 2(a) of the stipulation and order of November 5, 1954 [R. 71], and we submit that the answer should be in the negative.

Respectfully submitted,

DANIELS, ELSON & MATHEWS,

By EUGENE M. ELSON,

Attorneys for Appellees.